

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 LeMond Cycling, Inc.,

5 Plaintiff,

6 vs.

No. 08-CV-1010

7 Trek Bicycle Corporation,

8 Defendant.
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10
11 THE HONORABLE JANIE S. MAYERON

12 United States Magistrate Judge
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17 TAPE-RECORDED HEARING

18 TRANSCRIPT OF PROCEEDINGS

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23 Date: 7-29-09

24 Reporter: Lisa M. Thorsgaard
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APPEARANCES

MS. JENNIFER M. ROBBINS AND MS.

KATHERINE K. BRUCE, Attorneys at Law, Robins,
Kaplan, Miller & Ciresi, 800 LaSalle Avenue, Suite
2800, Minneapolis, Minnesota 55402-2015, appeared
on behalf of Plaintiff.

MR. RALPH A. WEBER, Attorney at Law,
Suite 700, 309 North Water Street, Milwaukee,
Wisconsin 53202, appeared on behalf of Defendant.

MR. ERIK T. SALVESON, Attorney at Law,
Suite 600, 220 South Sixth Street, Minneapolis,
Minnesota 55402, appeared on behalf of Defendant.

P R O C E E D I N G S

(NO REPORTER WAS PRESENT - the following transcript of proceedings was prepared from a COPY of the original court tape recording)

THE COURT: Good morning everyone. We're here this morning in the matter of LeMond Cycling versus Trek Bicycle Corporation. Court file No. 08-1010.

If the lawyers could identify themselves starting first with counsel for LeMond.

MS. ROBBINS: Jennifer Robbins on behalf of LeMond Cycling. And with me is Kate Bruce.

THE COURT: Okay. Just a moment. All right.

And on behalf of Trek?

MR. WEBER: Good morning, Your Honor. Ralph Weber and Eric Salveson for Trek Bicycle.

THE COURT: All right. We're here this morning to address Trek's motion to compel answers to interrogatories and to deem

1 facts admitted and for expenses.

2 I have reviewed the initial submission,
3 the response by LeMond Cycling and Greg LeMond
4 and the reply as well and prepared to hear
5 argument at this time.

6 MR. WEBER: Thanks, Judge.
7 Judge, do you have a preference whether I
8 address the request for admissions or the
9 contention interrogatories first?

10 THE COURT: It doesn't matter.
11 Why don't you address them in the order of
12 your brief which is the contention
13 interrogatory first.

14 MR. WEBER: Okay. Great.

15 With respect to the contention
16 interrogatories, companies, of course, breach
17 contracts if they do because of specific acts
18 or omissions that conflict with their duties
19 under the contract. So we have been asking or
20 we did ask what acts and omissions by Trek
21 does LeMond contend violate which duties under
22 the contract. We are referred by LeMond to
23 their complaint.

24 Well, that isn't very helpful because
25 the complaint spends an awful lot of time

1 talking about the acts or omissions of third
2 parties who aren't in this case including
3 Marion Jones, the sprinter, Bud Selig, the
4 commissioner of baseball and Lance Armstrong,
5 the bicyclist. So we asked them to specify
6 what acts and omissions by Trek conflicted
7 with what duties under the contract.

8 In addition to referring us to the
9 complaint, they have referenced the
10 anticipated -- then anticipated testimony of
11 their expert. They have a single liability
12 expert, a gentleman by the name of Jay Townly,
13 and we deposed him last Friday.

14 I understood Mr. Townly to have four
15 things that he pointed to as purported bases
16 for acts and omissions by Trek, two of them
17 specific and two generalized.

18 The first specific was that Trek, he
19 believes, did not have a professional
20 bicycling team that rode LeMond bikes, that
21 that was an insufficient marketing and
22 promotion of the LeMond bikes.

23 Number two, that Trek should have
24 gotten Greg more, Greg LeMond more public
25 appearances to promote his brand. Those are

1 the two specific.

2 The two generalized, the first related
3 to --

4 THE COURT: I'm sorry, Trek
5 should have gotten Mr. LeMond more?

6 MR. WEBER: More public
7 appearances.

8 THE COURT: Okay.

9 MR. WEBER: In support of his
10 brand.

11 THE COURT: Okay.

12 MR. WEBER: The second two
13 were more generalized. And I'm going to -- I
14 have a copy of my notes from the deposition
15 since we're just in the process of getting the
16 transcript.

17 The third and fourth were very
18 generalized. The first related to collateral
19 material that Trek could have put out
20 regarding the brand. I believe such things as
21 catalogs. And the fourth related to the sales
22 force. And he said that Trek should have made
23 the sales -- made sure the sales staff was
24 talking up the product and out explaining the
25 features and the differentiation of the

1 product.

2 And when I asked him to -- what the
3 basis was for that belief that Trek had not
4 done that, he said he'd read the depositions
5 of Trek's marketing manager. I said, well,
6 what was it about the marketing manager's
7 deposition that specifically said anything
8 about that. And he said he doesn't recall
9 anything specific, just got a general sense
10 from the deposition, a feel for what they did
11 based on reading these depositions.

12 So if, in fact, LeMond believes that
13 it's too burdensome to identify the acts and
14 omissions of Trek and, in fact, relies upon
15 the testimony of their single liability
16 expert, Townly, I'd be happy to prepare a
17 stipulation that says these are the four bases
18 for their allegations of acts and omissions of
19 Trek and we can move on. If they have
20 something else, then I think we're entitled to
21 know it.

22 Fact discovery has closed. Expert
23 discovery will close next week, and it is a
24 simple process to specify what it is you're
25 relying on at the close of fact discovery to

1 claim that Trek did something that it
2 shouldn't have under the contract or failed to
3 do something that it should have done under
4 the contract. And I simply don't understand
5 their refusal to participate in that very
6 helpful and appropriate exercise at this stage
7 of the case.

8 THE COURT: Let me just make
9 sure I'm clear, then. In your moving papers
10 you reference the fact that they said go look
11 at our complaint and go look at our -- wait
12 for expert opinion.

13 MR. WEBER: Right.

14 THE COURT: And then you
15 talked about how the expert opinion at that
16 time only addressed damages and did not
17 address liability. So I take it that since
18 your motion, this deposition of their expert
19 has been taken and it's through the course of
20 the deposition you learned what his opinions
21 would be on the issue of what I would call
22 liability, meaning how is it that Trek
23 breached the various contractual provisions of
24 the contract.

25 MR. WEBER: Correct. And I

1 would like -- because his testimony was not
2 always as clear as I might have wished it to
3 be, if we are going to go down that road, and
4 I'm happy to do this, that we would enter into
5 a stipulation with counsel that here are the
6 Townly opinions or in the usual course, they
7 can answer the interrogatory and say as Townly
8 explained, here are the four items that they
9 believe constitute failures by Trek as opposed
10 to us being uncertain at this stage of the
11 case exactly what they're relying on.

12 THE COURT: Okay.

13 MR. WEBER: With respect to
14 the requests for admissions, I think that it
15 occurred to me flying up here today that there
16 may be a very practical resolution to this
17 dispute. And that is -- I don't know if the
18 Court has had the opportunity to see LeMond's
19 motion -- memorandum in support of its motion
20 for summary judgment.

21 THE COURT: I did not look at
22 that. I saw the reference to it and the
23 reference to the exhibits that you talk about
24 in their memoranda where supposedly they were
25 using and relying on e-mails as well --

1 MR. WEBER: Right.

2 THE COURT: -- in support of
3 it but I did --

4 MR. WEBER: Right. Well, let
5 me give you the particular cites in case the
6 Court wants to refer to it.

7 THE COURT: All right.

8 MR. WEBER: If you look at
9 their brief at page 9, they --

10 THE COURT: Let me grab that.

11 MR. WEBER: Okay. You have
12 the --

13 THE COURT: I have the brief
14 here.

15 MR. WEBER: Oh, great.

16 THE COURT: I'm sorry,
17 their --

18 MR. WEBER: I'm sorry. This
19 is their summary judgment brief.

20 THE COURT: Summary judgment
21 brief, I do not have that. Go ahead.

22 MR. WEBER: I apologize.
23 Their summary judgment brief at page 9 states,
24 LeMond's stance against doping in professional
25 cycling represents a part of who he is within

1 the cycling community, citing See consumer
2 comments compiled at Robbins Declaration,
3 Exhibit 19. Okay.

4 And then they continue on that page,
5 Trek has attempted to silence LeMond and when
6 consumers have sought additional facts (See
7 consumer comments compiled at Robbins
8 Declaration, Exhibit 20). So their brief at
9 page 9 refers to the Robbins declaration and
10 specifically Exhibits 19 and 20 of that
11 declaration.

12 If you then look at the Robbins
13 declaration at page 4, paragraphs 20 and 21.

14 THE COURT: Of the Robbins
15 declaration that accompanies the summary
16 judgment motion?

17 MR. WEBER: Exactly right.

18 THE COURT: I'm sorry,
19 paragraphs 20 and 21?

20 MR. WEBER: Yes. And 20
21 states, Attached to this declaration 19 as
22 Exhibit -- I'm sorry, attached to this
23 declaration as Exhibit 19 is a true and
24 correct copy of a compilation of consumer
25 comments about Greg LeMond labeled LCI, which

1 is the LeMond Cycling Bates designation, 3294
2 to 308.

3 Then paragraph 21 reads, Attached to
4 this declaration as Exhibit 20 is a true and
5 correct copy of, and they give a list of Trek
6 Bates numbers.

7 THE COURT: Exhibit -- I'm
8 sorry, in Exhibit 20 are those described?

9 MR. WEBER: These are -- it
10 just says they're -- they refer back in the
11 brief as consumer comments.

12 THE COURT: Okay.

13 MR. WEBER: So first the
14 brief, then the declaration, and then we get
15 to Exhibits 19 and 20 themselves.

16 Exhibit 19 is a blog post and comments,
17 a blog post by a gentleman who's a long-time
18 friend of Mr. LeMond and colleague in the
19 cycling world who writes some supportive
20 comments of Mr. LeMond.

21 But then attached to that at LCI 3297
22 is exactly the kind of commentary that has
23 been in issue in this case. Someone responds
24 to Mr. Hamsted's blog post by saying, Andy's
25 statement is a clear, articulate, reasoned

1 stance against doping without a single note of
2 personal animus. Greg's comments cannot be
3 characterized by any of those adjectives.
4 Greg made it personal. Whatever the reasons
5 for that personal attack it colors his
6 statement, motives, and objectives. Andy's
7 statement enriches his stature. Greg's
8 impoverishes his.

9 So the very sort of thing that Trek has
10 been talking about about the damage to the
11 Trek brand. LeMond has brought these
12 materials forward. And recall under Rule 56
13 that they are representing to the court that
14 the materials they supply in support of their
15 motion for summary judgment are materials that
16 are admissible in evidence. So they have
17 provided the Court the very materials, some of
18 them, that we're talking about.

19 If you then turn to LCI 3301, another
20 comment submitted by --

21 THE COURT: I'm sorry, LCI?

22 MR. WEBER: 3301.

23 THE COURT: 3301 also part of
24 Exhibit 19?

25 MR. WEBER: Exactly.

1 THE COURT: All right.

2 MR. WEBER: Says Mr. Hamsted
3 seems to have offered some clear and heartfelt
4 thoughts about the problem of doping in the
5 pro ranks. No mud slinging there, just
6 concern for a sport he knows and loves. He
7 has also offered an exceedingly charitable
8 reading of LeMond's remarks about Lance
9 Armstrong. LeMond's words are not just words
10 of concern for cycling generally. They are an
11 attack on a particular individual, an attack
12 containing suggestions of wrongdoing that are
13 not elliptical, veiled or substantiated. If
14 LeMond has put his position and livelihood at
15 risk, it is not just and perhaps not chiefly
16 because he has taken a strong stance about
17 doping per se. I don't know Armstrong or
18 LeMond personally and I don't know who may
19 have started their pissy fit, but whoever
20 started this, I cannot help but think that
21 LeMond's accusations are, given the evidence,
22 an unfounded disgrace. I say this not because
23 I know Lance to be clean and not because I'm
24 unaware of doping in cycling more generally.
25 I say that because LeMond's published comments

1 about LA on their face seem to be -- seem to
2 go beyond the pail. To this reader they are
3 more dumb than brave.

4 We then turn to --

5 THE COURT: I'm sorry, more
6 dumb than?

7 MR. WEBER: Brave.

8 THE COURT: Okay.

9 MR. WEBER: Then we turn to
10 Exhibit 20 also submitted by LeMond. These
11 are a series of e-mails received by Trek and
12 produced by Trek in discovery and I believe
13 most, if not all of them, contemporaneously
14 back in 2004.

15 And these e-mails appear at, the first
16 one, Trek Bates page 113. And a consumer
17 wrote, It seems that Greg LeMond has forgotten
18 people are innocent until proven guilty. Greg
19 adds to the widespread drug speculation in
20 cycling rather than celebrate the TDF, Tour de
21 France. It's already bad enough with David
22 Miller. That's the crux of the issue,
23 speculation and no proof. If he couldn't say
24 anything positive, why didn't he just bite his
25 tongue. Greg LeMond is an ambassador for the

1 sport of cycling. He needs to act like it.

2 And a concluding comment which, of
3 course, is very powerful for a company that is
4 giving Mr. LeMond millions of dollars to
5 support that the -- the idea that it would
6 support their sales, the concluding comment
7 is, I own a Serotta and will never, in all
8 caps, buy a LeMond bike.

9 At Trek 100, again submitted by the
10 plaintiffs, comment: I will not be buying a
11 LeMond bike because of the nasty remarks Greg
12 LeMond has 'make' about Lance Armstrong. If
13 I, meaning if Greg can document illegal drug
14 use by Lance, then I would reconsider.

15 Trek 111, I'm not going to buy one of
16 your bikes ever. Unless you have proof of
17 Lance doping, then shut up. Every cyclist I
18 know shares this viewpoint. Signed Eric Vane.

19 Trek 92, Greg LeMond's --

20 THE COURT: I get the gist of
21 this, Mr. Weber.

22 MR. WEBER: Okay.

23 THE COURT: So your practical
24 solution is what?

25 MR. WEBER: My practical

1 solution is that they have -- they should be
2 stopped from -- in -- from challenging that
3 these documents are authentic and admissible.

4 THE COURT: The ones that
5 they've attached themselves as Exhibit 19 and
6 20?

7 MR. WEBER: The ones they have
8 attached and along with any others unless
9 there is some distinction to be made in the
10 types or format or circumstances.

11 They picked out a few of these and said
12 these are admissible. The burden would have
13 to be on them to say why others of the very
14 same ilk and format, content are not.

15 We are not here or we were not here
16 originally on admissibility. We wanted to
17 know from them, look, do you have any basis to
18 say these are not what they purport to be;
19 namely, consumer comments. They have
20 suggested no basis and I believe their use of
21 them in support of their Rule 56 submission
22 takes it beyond simply where I thought we
23 would be and I think should conclude the
24 matter.

25 In terms of the rule of evidence

1 involved, it's 901(b)(4) in which the
2 circumstances in which the e-mail was
3 generated and the content of the e-mail
4 provide sufficient indication of authenticity
5 to permit it to be authenticated and used.
6 And ultimately, of course, it's up to the jury
7 to decide whether the items are what they
8 purport to be but certainly more than enough
9 for the preliminary determination of
10 authenticity.

11 And the remarkable Lorraine decision
12 out of Maryland, I'm sure the parties when
13 they were submitting a matter involving a
14 \$30,000 lightning strike to a sailboat never
15 anticipated the very scholarly opinion that
16 would result, but such as it is at -- there's
17 a remarkable discussion, a very helpful
18 discussion I should say about 901(b)(4) in the
19 context of e-mails and it refers to, under
20 901(b)(4), that the content and substance of
21 the e-mails taken in conjunction with the
22 circumstances can be very helpful and
23 determinative to the court.

24 Of course and it says courts have
25 recognized this rule as a means to

1 authenticate electronic evidence including
2 e-mails, text messages and the content of web
3 sites, citing a case noting that
4 circumstantial evidence including the presence
5 of the defendant's work e-mail address,
6 content of which the defendant was familiar
7 with, et cetera, would sufficiently
8 authenticate the materials.

9 THE COURT: But let me ask a
10 question. What I understand LeMond is saying
11 is, number one, it's your burden at trial if
12 you want to use these e-mails or blogs to
13 authenticate those documents.

14 MR. WEBER: Correct.

15 THE COURT: That's number one.
16 It's not their burden, your burden.

17 MR. WEBER: Correct. And we
18 agree.

19 THE COURT: So obviously you
20 tried to shorten your burden by asking them to
21 admit that they were authentic.

22 MR. WEBER: Yes.

23 THE COURT: And they've
24 said -- right now they've refused. They've
25 said we have insufficient information to

1 admit.

2 MR. WEBER: Correct.

3 THE COURT: All right.

4 Setting aside the e-mails or blogs that
5 constitute Exhibits 19 and 20 which are part
6 of their summary judgment submission.

7 MR. WEBER: Right.

8 THE COURT: Setting aside
9 those, and I don't know if those are included
10 within the ones you've asked them to admit or
11 not.

12 MR. WEBER: They are.

13 THE COURT: All right.

14 Setting aside those, let's assume they're
15 saying we -- we don't know if they're
16 authentic or not. They are not our records.
17 They didn't come from our e-mails. They
18 didn't come from our servers. They're not
19 documents maintained in the ordinary course of
20 business. In fact, a lot of them came from
21 Trek or Trek found them during the course of
22 discovery or whatever. That doesn't preclude
23 you from, at the time of trial, arguing under
24 901(b)(4) or what other means you want to
25 argue that these e-mails in your possession or

1 however you obtained them are authentic.

2 MR. WEBER: Correct. Correct.

3 THE COURT: All right. The
4 Lorraine decision isn't about request for
5 admissions. It's about what's adequate to
6 establish authenticity.

7 MR. WEBER: Correct.

8 THE COURT: And so it
9 certainly wouldn't preclude you from
10 establishing authenticity based on the fact
11 that, for example, these e-mails that Trek
12 produced to them were obtained by them in the
13 ordinary course of business on their servers
14 and establishing authenticity in that fashion.

15 MR. WEBER: Correct.

16 THE COURT: All right. So I
17 just want to make sure I'm not confusing what
18 Lorraine -- Lorraine talks about how to
19 authenticate electronic information. What
20 Lorraine doesn't assist us on is whether this
21 other party has to agree that it's authentic.

22 MR. WEBER: Correct. Yes.

23 THE COURT: All right.

24 MR. WEBER: The other cases we
25 cite address the parties' burden in response

1 to request for admissions and they are -- it's
2 simply shrugging your shoulders and saying,
3 well, I don't know, it's not my document isn't
4 enough. They're a requirement of reasonable
5 inquiry.

6 And that's why we also ask the
7 follow-up interrogatory to say if, in fact, if
8 you refuse to admit the authenticity of these
9 materials, these consumer e-mails and blog
10 posts, then tell us why. Tell us so that
11 we're not surprised on the eve of trial about
12 some claim when we proceed to have them
13 admitted. And again, they proffered nothing
14 saying, well, it's your burden. Well, the
15 requests for admissions are intended to
16 prepare cases for trial and move beyond that.

17 So if they had something that suggested
18 these -- remember authentication is are these
19 what they appear to be. Do they appear to be
20 consumer e-mails? Do they appear to be
21 postings on web sites? If they had anything
22 to suggest that they weren't what they appear
23 to be, it was incumbent upon them to come
24 forward and not do what they did. The fact
25 that they then used the very same materials in

1 their rule -- in their summary judgment motion
2 takes it far beyond the pail.

3 So their approach is we can use these
4 asserting not just that they're authentic but
5 in fact that they're admissible. But when you
6 ask us are these authentic, we don't have to
7 say that isn't what this process is all about.

8 THE COURT: So your simple
9 solution is what?

10 MR. WEBER: I think that they
11 should be given their use and representation
12 to the court that materials of this very
13 nature are not only authentic but admissible,
14 that they should be estopped from denying
15 authenticity or admissibility of any of these
16 materials with I would be happy to allow them
17 a proviso, unless they can show specifically
18 with respect to a particular consumer e-mail
19 or blog posting why they should be allowed
20 relief from the usual rule.

21 THE COURT: All right. So
22 they should be estopped from denying
23 authenticity or admissibility --

24 MR. WEBER: Yes.

25 THE COURT: -- unless they can

1 come forward with respect to a particular
2 e-mail or blog that's attached here?

3 MR. WEBER: Yes.

4 THE COURT: All right. I have
5 no other questions of you.

6 MR. WEBER: Thanks, Judge.

7 THE COURT: All right. Maybe
8 you want to address the -- let's talk about
9 the request for admissions because we --
10 they're on my mind right now.

11 MS. ROBBINS: Sure, Your
12 Honor.

13 THE COURT: So it's the
14 proverbial sword and shield argument. You've
15 used these e-mails. You've used these blogs
16 in the summary judgment motions. Not only
17 ones that were produced by you but ones that
18 were produced by Trek and you're basically
19 representing to the judge that, in fact, these
20 are not only authentic, they're admissible
21 because otherwise you can't use them in your
22 summary judgment motion. So it -- it appears,
23 then, that you can -- what's good for the
24 goose is good for the gander.

25 If you're going to take the position

1 that these types of blogs and e-mails are, in
2 fact, authentic and admissible, why shouldn't
3 you be at least precluded from arguing that
4 the balance of the ones that Trek has attached
5 to the request for admissions are not also
6 authentic and admissible?

7 MS. ROBBINS: Well, I think
8 that the -- this all goes back to the main
9 context as far as this request for admission
10 in general which is we did attach these
11 e-mails to the summary judgment motion. We
12 attached very few. And half of them, as you
13 said and as Mr. Weber pointed out, were
14 produced by us in this litigation. We had
15 more knowledge about the compilation of those
16 documents.

17 And then further, we haven't asked Trek
18 to authenticate 500 pages of documents as Trek
19 has asked of us. And the bottom line is that
20 we just have no knowledge as to the source of
21 many of the e-mails that Trek has asked us to
22 either admit or deny the authenticity of. And
23 they were kind enough to de-duplicate the
24 exhibit for Your Honor's exhibit but even with
25 it, it's still almost 500 pages.

1 And if I could actually approach the
2 bench and just hand you an example of some of
3 the e-mails that they are requesting --

4 THE COURT: Yes.

5 MS. ROBBINS: -- to
6 authenticate.

7 THE COURT: Yes. Do you have
8 a copy to provide to Mr. Weber?

9 MS. ROBBINS: Yes, I do.

10 THE COURT: All right.

11 MS. ROBBINS: As you can see
12 from the examples that I have just handed up,
13 and this was just a cursory look that I took
14 here at Trek's motion, the first example is
15 from someone -- the e-mail address says
16 anonymous@anonymous.com. There's no way for
17 us to verify the information here, whether
18 this is, in fact, a consumer or a dealer who
19 created this document.

20 The second one says -- there's actually
21 not even a "from" line there. It just says,
22 in the text of the e-mail, below is the result
23 of your feedback form. It was submitted by
24 Lance Armstrong. I'm inclined to think this
25 is not actually from Lance Armstrong. And

1 again --

2 THE COURT: I'm sorry, you're
3 inclined to what?

4 MS. ROBBINS: Think that this
5 is not actually from Lance Armstrong and that
6 this is another example here of one that we
7 just will not be able -- we have no knowledge
8 as to the source of this information.

9 The last couple are similar. The
10 second one is submitted by somebody that's
11 calling themselves grow up. And the last one is
12 from somebody saying their name is LeMond is a
13 jerk.

14 This is the type of thing that we --
15 we're very hesitant to just blanketly either
16 admit or deny authenticity to all of these
17 documents. Trek propounded one request for
18 admission to deal with all of the e-mails and
19 one request for admission to deal with all of
20 the blogs. And this, going back to the case
21 law that we found in relation to
22 electronically stored information, is
23 something that should be taken on a case by
24 case basis we believe. And asking us to
25 authenticate this great number of documents,

1 many of which we have no idea as to the source
2 of information --

3 THE COURT: When you say you
4 don't have any idea as to the source, what are
5 we talking about?

6 MS. ROBBINS: We are talking
7 about we have no idea who these e-mails
8 actually came from, whether they are in fact
9 from consumers, from dealers. We don't have
10 any idea as to how the e-mails were captured
11 or, as to the blog posts, how the web sites
12 are compiled to the content of --

13 THE COURT: But you relied on
14 the similar types of e-mails and blogs with
15 respect to your motion for summary judgment.
16 And I'm assuming, maybe I'm wrong, that you
17 don't know what the source of those e-mails
18 are. You don't know what blog -- in other
19 words, how the blog posts, the servers are
20 maintained. And yet I take it you made a leap
21 of faith that those types of blogs or e-mails
22 are not only authentic but admissible.

23 MS. ROBBINS: Well, as to
24 that, we -- we'd -- as I said, we attached
25 very few and we are willing to accept the

1 burden of proving authenticity and
2 admissibility as to those. We have accepted
3 that as our burden. Trek here --

4 THE COURT: Well, not only
5 accept it as your burden, you've represented
6 to Judge Kyle by attaching them that they, A,
7 are authentic, and B, are admissible.

8 MS. ROBBINS: And I can
9 understand that we would then be estopped from
10 arguing that those would not be admissible but
11 as to the other ones, I just don't think that
12 you can, under the rule, say that because all
13 of these are e-mails -- I mean, these are
14 purportedly from different individuals. The
15 blog posts are from different web sites and we
16 just have no knowledge as to how each of these
17 blog posts are maintained or who provided the
18 information.

19 THE COURT: And I understand
20 that you said you don't have any knowledge,
21 but the rule also talks about, then, if you're
22 going to say you have insufficient knowledge,
23 you need to talk about what reasonable inquiry
24 you made in order to obtain knowledge so that
25 you could admit or deny and you haven't

1 answered that interrogatory either. It sounds
2 like you're just saying we don't know and by
3 implication, we haven't done anything to find
4 out -- to take the blinders off.

5 MS. ROBBINS: Well, as far as
6 the reasonable inquiry, for many of these
7 e-mails I actually wouldn't know where to
8 start with a reasonable inquiry. I wouldn't
9 know how to go about finding out the veracity
10 of this type of information. But we are
11 willing to, especially with some of the dealer
12 e-mails that are from verifiable sources, we
13 would be willing to authenticate those.

14 The main problem was that this -- our
15 request for admission was directed to all 500
16 e-mails. And actually, in the context of the
17 requests for admissions, it wasn't just as to
18 these e-mails. They requested that we admit
19 or deny the authenticity, the admissibility
20 and the -- and get rid of any hearsay
21 objections to over 13,000 pages of documents.

22 THE COURT: I didn't see that
23 in the request for admission. I only saw that
24 they were seeking to ask you to authenticate
25 them.

1 MS. ROBBINS: Right. And so
2 after the meet and confer between the parties,
3 it appears, judging by their motion here, that
4 they've dropped the rest of those arguments as
5 to the other 12,000 pages of documents. But
6 in formulating our response to the
7 interrogatory initially, it was in the context
8 of dealing with 13,000 pages of documents,
9 many of which were -- as these e-mails are
10 created by people for whom we have no idea,
11 and then as well as the production from third
12 parties to the litigation and we felt that we
13 were not in the place we -- the place to
14 authenticate those records either.

15 THE COURT: You did say that
16 you would be willing to authenticate, if I
17 heard you correctly, a certain subset of
18 e-mails.

19 Is that correct?

20 MS. ROBBINS: Right. I think
21 that it would be fair for us to authenticate
22 those with verifiable sources such as -- I
23 believe it's Exhibit 11 has a number of
24 e-mails --

25 THE COURT: Well, they're not

1 seeking -- I don't think it's Exhibit 11 that
2 they're asking for you to authenticate in this
3 motion.

4 MS. ROBBINS: Okay. Well --

5 THE COURT: Unless I misread
6 it. Let me take a look here. Let me get that
7 part of it here. Request No. 1, I don't know
8 if they -- it says for purposes of request for
9 admissions 1, 2 and 3, they define the terms.
10 And then request No. 1 deals with consumer
11 dealer e-mails and letters. And request No. 4
12 is the blog post. I don't see a reference to
13 Exhibit 11.

14 MS. ROBBINS: Okay.

15 THE COURT: Maybe those go
16 hand in hand.

17 MS. ROBBINS: Right. My
18 understanding, and I could have misread the
19 brief, was that Exhibit 10 and Exhibit 11 both
20 provided examples of the e-mail.

21 THE COURT: Oh, exhibits to
22 the declaration. I'm sorry.

23 MS. ROBBINS: Yes, Your Honor.

24 THE COURT: I'm sorry.

25 MS. ROBBINS: That's fine.

1 THE COURT: So when you say
2 you would be willing to authenticate those
3 with verifiable --

4 MS. ROBBINS: Right. Those
5 with verifiable. A lot of those e-mails have
6 names of actual Trek dealers. We could
7 certainly look into contacting those
8 individuals. Those I agree would be -- we
9 would agree to authenticate those documents.
10 But as to the bulk of the rest of the e-mails
11 we really don't have any idea where they came
12 from we are much more hesitant.

13 THE COURT: And let me -- I
14 don't mean to oversimplify it but given, for
15 example, the one you gave me, the first
16 example from anonymous@anonymous.com, isn't it
17 possible to send an e-mail to
18 anonymous@anonymous.com and attach this e-mail
19 and ask if they sent it to Trek, to Trek
20 consumer?

21 MS. ROBBINS: We could
22 certainly go through that process. I mean, I
23 think the concern was that there were so many
24 of these documents and for many reasons
25 anonymous@anonymous.com probably does not even

1 exist. But we would -- I mean --

2 THE COURT: But you don't know
3 that yet.

4 MS. ROBBINS: We -- no. But,
5 Your Honor, I would be willing to find out.

6 THE COURT: Some of them
7 don't -- I see. The other ones don't even say
8 who the "from" is.

9 MS. ROBBINS: That's correct.

10 THE COURT: The Trek 139, as
11 far as I can tell, doesn't have a "from."

12 MS. ROBBINS: Correct, yes.

13 And I believe --

14 THE COURT: Although the last
15 one, LeMond is a jerk at jerk@LeMond.com
16 apparently back in 2004.

17 MS. ROBBINS: Right.

18 THE COURT: Was a viable
19 e-mail address or at least that's the
20 suggestion.

21 MS. ROBBINS: Yes. And we
22 would be willing to go through that process.

23 As I said, I think the main thing here
24 was just in the context of these requests for
25 admissions, this one request for admission

1 that encompassed all of these e-mails was
2 just -- it just didn't ring true with common
3 sense as far as the authentication of
4 documents and what we knew about many of these
5 documents is so very little.

6 THE COURT: All right. Let's
7 talk about, unless you have anything more on
8 the request for admissions, let's address the
9 contention interrogatory.

10 MS. ROBBINS: Sure, Your
11 Honor.

12 THE COURT: So discovery is
13 over in this case. Your expert has now
14 testified. What Mr. Weber has suggested is,
15 from his understanding of your expert's
16 deposition, he's given no basis for stating
17 how it is that Trek has breached its
18 obligations to your clients. Based on that
19 now, are you willing to enter into a
20 stipulation that those are the four bases for
21 alleging breach or revising supplementing your
22 interrogatories so as to be able to
23 incorporate specifically what it is you're now
24 relying on?

25 MS. ROBBINS: Definitely.

1 Actually, Your Honor, I was really heartened
2 to hear Mr. Weber's argument up here today. I
3 think that a lot of that makes sense. Given
4 the timing of the original interrogatory that
5 was -- when we did initially rely on our
6 expert reports and now that our liability
7 expert has been deposed, we feel like it would
8 be consistent to go ahead and amend or
9 supplement our interrogatory response.

10 We would ask, though, that we be
11 allowed to supplement at the end of expert
12 discovery which should be closing at the end
13 of next week after rebuttal reports are in
14 just so that all of the information is
15 consistent.

16 THE COURT: So in other words,
17 you're no longer opposing that portion of
18 their motion on the contention interrogatory.
19 You are willing to supplement and amend your
20 answer and basically remove the objection and
21 provide the information that you're now
22 relying on to support the claims for breach?

23 MS. ROBBINS: Correct. Yes.
24 The only thing I would ask is that we just
25 clarify that Trek has stated in its brief that

1 it is not seeking all facts as to all of the
2 contentions and we're definitely willing to
3 provide the principal facts, the main facts,
4 but I just wanted to ask for clarification on
5 that.

6 THE COURT: All right. I'll
7 take that up with Mr. Weber, then. All right.

8 Mr. Weber, let's address the contention
9 interrogatory. Based on what's been proposed,
10 is that satisfactory that they will supplement
11 and amend their answer to interrogatory No. 11
12 and identify the principal or main facts that
13 they're relying on to establish a breach of
14 the -- in other words, to support their
15 contention?

16 MR. WEBER: Yes. That sounds
17 reasonable, Judge.

18 THE COURT: All right.

19 MR. WEBER: So long as they do
20 it in good faith and tell us what the sum and
21 substance of it is and aren't overly generic,
22 that's fine. If we have an issue with it, of
23 course we'll raise it with the Court.

24 THE COURT: All right. Well,
25 I'm assuming that the response would be in

1 good faith. I mean, the whole point of the
2 contention interrogatory like this at the end
3 of discovery is to make sure there are no
4 surprises to either side and that the point of
5 discovery is to know what the other side is
6 going to say at trial.

7 So I think a contention interrogatory
8 like this at this point is appropriate and
9 given what defendant or what LeMond has said
10 which is they'll supplement, I'm assuming you
11 will come back with a substantive and good
12 faith answer and if you're not satisfied, I
13 will permit you to revisit that issue with me.

14 MR. WEBER: Thanks, Judge.

15 THE COURT: All right. Let's
16 talk about the requests for admissions.

17 What I did here, counsel state number
18 one is that to the extent that your e-mails or
19 blogs include Exhibits 19 and 20, that they I
20 think are willing to admit the authenticity
21 and admissibility of those e-mails and blogs
22 because they've relied on it themselves.

23 I also heard them say they would be
24 willing to authenticate -- to go through the
25 process of or take steps to authenticate or to

1 determine whether the e-mails or blogs are
2 authentic to the extent they came from
3 verifiable dealers and also I believe also
4 committed to doing that from e-mails where at
5 least it identifies the "from" line to see
6 whether these -- to do what they need to do to
7 establish whether this was an authentic e-mail
8 from a particular source.

9 If I've got that right on what they are
10 willing to do, is that satisfactory?

11 MR. WEBER: Well, not quite,
12 Judge. I think what they're doing is they're
13 conflating authentication and admissibility.
14 And authentication is no more than do the
15 circumstances indicate and through a variety
16 of tests that this is what it appears to be.
17 And what we're asking them to authenticate is
18 that these are comments from consumers that
19 were received by Trek or posted on various
20 blogs.

21 And so as to the examples that the
22 Court was given which are Trek 173, 139, 93
23 and 79, you will note that each has the header
24 on it of Lisa Smith. She's a person in the
25 law department to whom when consumer

1 commentary was coming into Trek's web site in
2 July 2004, things were forwarded and printed
3 off by her to keep track of the feedback that
4 was coming in. And the context, of course,
5 was in 2004 Mr. LeMond gave an interview
6 whereby he said that Lance will do anything to
7 keep his secret. In response -- and again,
8 authentication is part context.

9 In immediate response to the public
10 airing of those comments, Trek got hundreds of
11 e-mails just like the ones you have here and
12 blog postings. There was a place on the Trek
13 web site, the LeMond web site, where people
14 could make a comment and that's what we're
15 looking at.

16 Mr. LeMond himself got so many e-mails
17 in response to some of his public commentary
18 on his own separate web site that he had
19 directed that it be shut down. So the context
20 is he makes a statement, tremendous public
21 response. Those responses are gathered and
22 kept and produced by Trek and we're now at the
23 stage where we ask them to say, admit that
24 these are items that came into Trek's web site
25 in response to Mr. LeMond's commentary. Some

1 of them, yes, probably can't be determined
2 who, in fact, these people are but that for
3 purposes of what we're talking about, that
4 isn't what is important. These are things
5 that came into Trek in response to
6 Mr. LeMond's comments. Mr. LeMond got the
7 very same sort of thing.

8 So it's not a question of if they
9 thought that these weren't really consumer
10 e-mails, then I would have expected them over
11 the last year to try to do discovery. And
12 guess what? There was a guy in Idaho that was
13 writing all these. These weren't consumer
14 comments. This was so and so in Idaho. They
15 haven't done that because it's not true.

16 THE COURT: Let me throw out
17 an idea here. And I'm not saying that the
18 LeMond defendants are going to -- or LeMond is
19 going to agree to this but let me throw this
20 out as an idea.

21 Rather than asking them to authenticate
22 each and every one of these e-mails and blog
23 sites or to admit that these are authentic
24 under Rule 901, if instead it was to ask them
25 to admit that they had no evidence to suggest

1 that any of these e-mails or blogs were not
2 authentic, would that satisfy your desire to
3 find out if they've got anything out there
4 that suggests that it isn't authentic so that
5 you can do what you need to do at trial to
6 establish authenticity.

7 MR. WEBER: I think that gets
8 us most of the way there. And if they had
9 done that in response to the initial request
10 for admission and follow-up interrogatory, I
11 wouldn't ask for more because they were asked
12 specifically to say as to any document that
13 you have reason to believe is not authentic,
14 tell us why.

15 THE COURT: So my question is
16 why --

17 MR. WEBER: And so they blew
18 us off.

19 THE COURT: If they would
20 agree to that today, that they would answer a
21 request for admission to the effect of you
22 have no evidence to admit that the following
23 e-mails are not authentic, would that satisfy
24 your -- which then gives them the option to go
25 collect evidence or to simply rely on it as is

1 and you'll go forward with proving up
2 authenticity at trial, would that satisfy your
3 motion?

4 MR. WEBER: With all respect,
5 Your Honor, I think in light of the fact that
6 they forced them up here and go through this
7 exercise and not -- and importantly used the
8 very same materials in their submission to
9 Judge Kyle, I don't think -- I think their
10 opportunity to do that has passed.

11 THE COURT: Okay.

12 MR. WEBER: And with respect
13 to the assertion that -- and as to these
14 e-mails where you could not go back now five
15 years later and figure out was it or is it a
16 live web site, I would ask the Court to take
17 note of the Resolution Trust Corp. case, the
18 Eighth Circuit decision from 1994 at 17 F.3d
19 1126.

20 And at Note 3, page looks like 1132,
21 the court notes, "As long as the other
22 requirements of the business records exception
23 are met," in this case that these were
24 received by Trek in the ordinary course and we
25 will have custodians that corroborate that, "a

1 custodian or other qualified witness need not
2 have personal knowledge regarding the creation
3 of the document offered or personally
4 participate in its creation or even know who
5 actually recorded the information." So --

6 THE COURT: But wasn't the
7 whole context of the Resolution Trust case
8 about whether it was admissible as a business
9 record exception and not authenticity?

10 When I look at that quote, it actually
11 starts off, "As long as other requirements of
12 the business records exception are met," and
13 then goes on to say, "custodian or other
14 qualified witness need not have personal
15 knowledge regarding the creation of the
16 document offered or personally participate in
17 its creation or even know who actually
18 recorded the information."

19 It appears that Resolution Trust was
20 focusing on what it takes to establish an
21 exception under the business records exception
22 and wasn't addressing the issue of
23 authenticity under Rule 901.

24 MR. WEBER: Correct. Because
25 in Resolution Trust they were talking about

1 the handwritten notes of a bank examiner who's
2 gone and looked to the bank. And I don't
3 think there was any dispute that the documents
4 were what they purported to be; namely, notes
5 of a bank examiner. That again,
6 authentication, very low threshold.

7 Likewise here, there's no real dispute
8 that these are consumer comments received by
9 Trek and received by LeMond and that's why
10 they use them.

11 So as to authentication, we should get
12 beyond that hurdle. I was responding to the
13 suggestion that there should be some
14 significance as they say to the fact that,
15 well, I don't know who the actual writer of
16 this was. That gets ahead to a hearsay
17 objection and, hence, I've raised the
18 Resolution Trust case.

19 THE COURT: Okay.

20 MR. WEBER: So it's really not
21 their -- their identifying the anonymity of
22 some of these authors has nothing to do with
23 authenticity; i.e., is this a response
24 received in the consumer web site by Trek.

25 THE COURT: Okay. Anything

1 further on behalf of Mr. LeMond or LeMond
2 Cycling?

3 MS. ROBBINS: I have just one
4 quick point, Your Honor, and that is that
5 during the meet and confer, we did ask Trek
6 for more information so that we could properly
7 respond to these requests for admissions and
8 they did not provide it. If they were to
9 provide information like, for example, we
10 never -- they never did tell us until right
11 just now when Mr. Weber presented that those
12 were kept in the ordinary course of business
13 and explained who Lisa Smith is, we were
14 unaware of that until now. If we had more
15 information as to these documents, then we
16 could then evaluate them on a case by case
17 basis.

18 THE COURT: And I think their
19 response in the reply was that your duty to
20 inquire came before you answered the request
21 for admission and put in insufficient
22 knowledge and not after as part of a meet and
23 confer.

24 MS. ROBBINS: Well, I think
25 that given that we were not going to be trying

1 to get these 500 pages of e-mails into
2 evidence that it was not our burden to seek
3 out the information beforehand as to how these
4 documents were kept. Once Trek has decided to
5 rely on that information at trial, then I
6 think then, as we were discussing, the hurdle
7 then to get those admissible is at that point.

8 THE COURT: All right.

9 Anything further? Anything further?

10 MR. WEBER: No, Your Honor.

11 THE COURT: Well, on the
12 contention interrogatory, we have agreement of
13 the parties that after the rebuttal expert
14 report is filed, that then LeMond will
15 supplement interrogatory No. 11 and answer it.

16 And so how soon after the expert
17 report, that rebuttal expert report is issued
18 will you be able to provide them with the
19 supplemental interrogatory?

20 MS. ROBBINS: I think probably
21 we just need a couple of business days after
22 that --

23 THE COURT: When is the
24 rebuttal report due?

25 MS. ROBBINS: I believe it's

1 the 7th of August.

2 THE COURT: All right. Why
3 don't we say, then, by August 14.

4 MS. ROBBINS: Sure.

5 THE COURT: And on the request
6 for admissions, I'll have to take that matter
7 under advisement and I'll issue an order
8 separately on that.

9 MR. WEBER: Thank you, Judge.

10 THE COURT: All right. Thank
11 you very much.

12 Anything further on behalf of either
13 party in this matter?

14 MS. ROBBINS: No, Your Honor.

15 THE COURT: All right.

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1 STATE OF MINNESOTA)
) ss.
2 COUNTY OF WASHINGTON)

3

4 BE IT KNOWN, that I transcribed the
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6 contained herein;

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9 That the proceedings were recorded
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16 That I am not related to any of the
17 parties hereto nor interested in the outcome of
18 the action;

19

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21 IN EVIDENCE HEREOF, WITNESS MY HAND.

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23

24

25

s:/ Lisa M.Thorsgaard